No. 02-371

(10)

SUPREME COURT
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In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

KEVIN LAMONT HICKS,

Appellee.

ON GRANT OF A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

BRIEF OF *AMICI CURIAE* CITY OF RICHMOND AND RICHMOND REDEVELOPMENT AND HOUSING AUTHORITY IN SUPPORT OF APPELLANT'S BRIEF ON THE MERITS

John A. Rupp, City Attorney
Norman B. Sales, Senior
Assistant City Attorney
City Hall, Room 300
900 East Broad Street
Richmond, VA 23219
(804) 646-7940

Counsel for *Amicus Curiae*
City of Richmond, Virginia

William G. Broaddus*
Jonathan T. Blank
William H. Baxter II
Godfrey T. Pinn, Jr.
McGuireWoods LLP
One James Center
901 E. Cary Street
Richmond, VA 23219-4030
(804) 775-1000

Counsel for *Amicus Curiae*
Richmond Redevelopment
and Housing Authority

*** Counsel of Record for *Amici***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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STATEMENT OF INTEREST OF *AMICI*[1]

The City of Richmond ("City" or "Richmond") is the capital and fourth largest city in the Commonwealth of Virginia. Through the ongoing efforts of City Council and various departments and agencies, the City of Richmond works to provide for, and improve, the security and well-being of the almost 200,000 citizens living within its boundaries. Pursuant to § 2.04 of its Charter, the City of Richmond has the "power to adopt ordinances . . . for the preservation of the safety, health, peace, good order . . . [and] welfare of its inhabitants . . . ." Section 2.03(a) of this Charter specifically authorizes it to close public streets, and Va. Code Ann. § 15.2-2006 confers the additional ability for the City to alter or vacate public rights-of-way either upon the motion of City Council or the application of a person.

Created by Richmond City Council in 1940, Richmond Redevelopment and Housing Authority ("RRHA") is the largest public housing authority in the Commonwealth of Virginia. Its mission includes the provision of quality and affordable housing to low- and moderate-income tenants, the promotion of their self-sufficiency and economic betterment, the revitalization and elimination of blighted areas within the City, and the prudent oversight of growth and conservation programs designed to improve the overall quality of life in urban neighborhoods and environments.

Through an array of programs and in collaboration with the City of Richmond, the Commonwealth of Virginia, and other interested parties, RRHA actively seeks on a daily

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[1] In accordance with Supreme Court Rule 37.6, *amici* hereby represent that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* has made any monetary contribution to the preparation or submission of this brief. The parties' written consents are accompanying this brief pursuant to Rule 37.3(a).

basis to prevent violence and criminal activity in its various communities, promote safe and secure dwellings and living conditions, and provide opportunities in which law-abiding tenants can empower themselves and realize their economic and educational potentials, as well as their dreams of home ownership.

RRHA's housing operations cover sixteen housing developments for low-income families, nine developments for low-income elderly and the disabled, and scattered-site single-family homes and special housing units throughout the City of Richmond. Through its approximately 350 employees, RRHA manages over 4,000 public housing units in the City and provides subsidized housing in over 2,700 of these units. In all, RRHA serves approximately 12,000 public housing residents, and its programs directly serve and benefit over 33,000 Richmonders.

RRHA, in conjunction with City officials, formulated the trespass-barment policy for its communities as part of an ongoing front-line effort to rid public housing neighborhoods of criminal activity (often violent and drug-related) that is all too frequently committed by non-tenants and non-residents with no lawful purpose for being present on RRHA property.

Richmond City Ordinance No. 97-181-197, which closed and privatized certain interior streets in the Whitcomb Court housing development so that the City's right and title in these streets could later be deeded over to RRHA, was adopted by Richmond City Council under the authority granted by City Charter §§ 2.03 and 2.04, and Va. Code Ann. § 15.2-2006. This street privatization effort directly led to the implementation of the RRHA trespass-barment policy that was erroneously stricken below as being overbroad and violative of the First Amendment of the Constitution of the United States.

INTRODUCTION

A deadly mix of drugs and guns on or near several of RRHA's public housing communities mandated that RRHA and the City act to protect RRHA's tenants. The overwhelming majority of tenants in these neighborhoods are African-American. Most households are single-parent and headed by women. The presence of crime, often violent crime brought to their streets, sidewalks, and playgrounds from without, denies those tenants the opportunity to live in safe communities, and to raise their families free from fear of violence. Most do not have the capability to relocate to safer neighborhoods. These law-abiding citizens should not be forced to tolerate such conditions. While such problems with violent crime in public housing are not, and have not been, unique to the City of Richmond. Department of Housing and Urban Dev. v. Rucker, 122 S. Ct. 1230 (2002), RRHA and the City could not stand by idly.

In response, RRHA devised, and Richmond City Council, after review by other City departments, approved, a series of measures that resulted in the privatization of streets and sidewalks in Whitcomb Court (and eventually in other RRHA communities).[2] This allowed RRHA, with the approval and support of the City Police Department, to implement a trespass-barment policy that reduced crime in Whitcomb Court[3] until it was stricken as overbroad by five of the seven justices of the Supreme Court of Virginia. The events leading to this erroneous decision are as follows:

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[2] These concerns cross racial lines. RRHA is governed by seven commissioners. Currently, five, as well as its Executive Director, are African-American; two are white. Richmond City Council is composed of nine members. Currently, six are African-American, as are the City Manager and the City's Chief of Police; three council members are white.

[3] Whitcomb Court is the only RRHA neighborhood specifically at issue in this appeal.

STATEMENT OF ADDITIONAL RELEVANT FACTS

The Compelling Need to Reduce Crime in Richmond

During the twelve years preceding street privatization in Whitcomb Court under City Ordinance No. 97-181-197, and the resulting launch of RRHA's trespass-barment policy, the City of Richmond was known as "the murder capital of Virginia"[4] and "one of the nation's murder capitals."[5]

The availability of illegal drugs was a key cause of Richmond's "national Murder City image."[6] In 1986, "crack cocaine came to town"[7] "selling for as little as $5 a 'rock,'"[8] and homicides increased dramatically.[9] Between 1986 and 1997, Richmond's homicide rate per 100,000 people ranked perennially among the top ten in the nation, fluctuating between seventh place (1986)[10] and second place (1994,

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[4] Gary Robertson, For the Media: 'A Feeding Frenzy'; Reaction Soon Overshadowed Event, *Richmond Times-Dispatch*, June 21, 1998, at A-1.
[5] Carrie Johnson, Crime That's Often Lost; No Easy Definitions or Answers to Rape, *Richmond Times-Dispatch*, Aug. 24, 1998, at A-1.
[6] Mark Holmberg, Richmond on Top of Crime; 'It's a Phenomenal Turnaround,' Renaissance Executive Director Says, *Richmond Times-Dispatch*, Jan. 3, 2000, at B-1.
[7] Mark Holmberg & Jim Mason, 10 Slayings in City in First 15 Days of '97 a Bloody Beginning, *Richmond Times-Dispatch*, Jan. 16, 1997, at B1.
[8] Mark Holmberg, He Escapes Crack's Hook and Comes Alive, *Richmond Times-Dispatch*, Oct. 15, 2000, at S151.
[9] Crack cocaine is still a major cause of death in Richmond. Paige Akin, 2002 Homicide Rate Attributed to Drugs; More Than a Third Came at Year's End, *Richmond Times-Dispatch*, Feb. 13, 2003, at B1.
[10] Michael Martz, City Man's Death Sets Homicide Record, *Richmond News Leader*, Dec. 30, 1989, at 1.

1997).[11] Its rate was consistently the highest in the Commonwealth over this same period.[12]

Commentators and City residents have stated various rationales for Richmond's ranking, the most common being the increased prevalence and mix of drugs and guns on City streets.[13] One reporter observed that "locals tend to blame it mostly on drug-related killings, especially in and around the housing projects."[14] This perception was supported by empirical evidence. During January-June 1990, only 6% of Richmonders lived in public housing, but 41% of homicides committed in the City occurred there.[15] Similarly, during January-April 1990, a disproportionate number of robberies (15%), rapes (17%), and aggravated assaults (24%) occurred in public housing.[16]

Richmond sought and received federal assistance with its law enforcement efforts. For example, HUD named the City in 1990 as one of twenty that would receive funds for a program designed to "seize the public housing leases of alleged drug dealers or people believed involved in the drug trade."[17] In 1994, HUD awarded RRHA a $1.1 million grant

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[11] Gordon Hickey, FBI Numbers Confirm Trend; Richmond No. 2 in '94 Murder Rate, *Richmond Times-Dispatch*, May 22, 1995, at A1; Gordon Hickey, Violent Crimes Drop in City; Clearance Rate Up; Police Work Praised, *Richmond Times-Dispatch*, Apr. 28, 1998, at A-1.
[12] Gordon Hickey, Gunshot Treatment Costs High, *Richmond Times-Dispatch*, Mar. 14, 1999, at A-6.
[13] Brian Kelley, City May Set Two Homicide Records, *Richmond Times-Dispatch*, Oct. 22, 1990, at A1.
[14] Ray McAllister, Using the Police Ball to Make a Statement, *Richmond Times-Dispatch*, Oct. 8, 1993, at B1.
[15] Gordon Hickey, Homicides Found to Occur Mostly in Housing Projects, *Richmond News Leader*, Aug. 11, 1990, at 17.
[16] Gordon Hickey, Violent Crime Rate Is Confirmed Higher in City Housing Projects, *Richmond News Leader*, May 21, 1990, at 1.
[17] Randolph Goode & Peter Hardin, Drug Eviction Notices Are Filed in Richmond, *Richmond News Leader*, June 26, 1990, at 1.

for increased police presence in eight public housing projects plagued by drug trafficking.[18] And in 1995, Richmond was given one of two federal grants awarded by the United States Bureau of Justice Assistance "to develop and implement a strategy to reduce homicides in the city . . . ."[19]

Despite the increased resources that were deployed to combat these evils, violent crime and drug-related activities continued in RRHA-managed neighborhoods. Indeed, "[t]he first six months of 1994 was the deadliest half-year in Richmond's history, as 78 people were shot, stabbed, bludgeoned or scalded to death by killers as young as 14 years old."[20] These killings were "fueled largely by arguments, drugs, alcohol and greed."[21]

This tragic situation posed serious consequences for the law-abiding residents and tenants of public housing developments. Recognizing their plight, RRHA and the City worked together to convert Richmond from "one of the nation's bloodiest cities into a model of crime-fighting prowess."[22]

The Development of the Trespass-Barment Policy

Understanding that the majority of crimes occurring in public housing were committed by outsiders[23] – especially

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[18] Area/State, Grant to Provide Officers, *Richmond Times-Dispatch*, Oct. 9, 1994, at B9.

[19] Dorine Bethea, City Gets $350,000 Grant to Plan Strategy for Curbing Homicides, *Richmond Times-Dispatch*, Dec. 13, 1995, at B-1.

[20] Mark Holmberg, First Half of '94 Sets Homicide-Rate Record, *Richmond Times-Dispatch*, July 5, 1994, at A1.

[21] *Id.*

[22] Carrie Johnson & Gordon Hickey, Back from the Brink; Deaths Dip as City Takes Blight Out of Crime, *Richmond Times-Dispatch*, Oct. 11, 1999, at A-1.

[23] Teresa Lemons, No-Trespassing Policy to Begin in Gilpin Court, *Richmond News Leader*, Nov. 9, 1990, at 17.

by persons who had no legitimate business or social purpose for being in its developments – RRHA implemented a no-trespassing policy in the Gilpin Court neighborhood in 1990. It was designed to promote the official enforcement of existing state law, *i.e.*, Va. Code Ann. § 18.2-119 ("Trespass after having been forbidden to do so; penalties").

In November 1990, RRHA issued a letter to residents advising them of this "No Trespassing" policy and inviting public questions and comments. Shortly thereafter, workers began to post 250 "No Trespassing" signs throughout Gilpin Court,[24] and RRHA released the following bulletin:

Trespassers Beware!!!

> Beginning November 20, 1990, [RRHA], in conjunction with the Richmond City Police, will begin prosecuting all trespassers in the Gilpin Court public housing community . . . .
>
> . . . .
>
> Our No Trespassing Policy was proposed by the Gilpin Safe Neighborhood Program Committee, which includes RRHA residents, RRHA staff, community leaders, and the Richmond City Police. We know that the majority of criminal activity that occurs in public housing is conducted by non-residents. This policy, which is part of our continuing effort to make our properties safe and crime-free, will allow residents to control who visits their community.

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[24] Brian Kelley, Gilpin Court Trespassing Signs Go Up, *Richmond Times-Dispatch*, Nov. 9, 1990, at B4.

(emphasis in original) (internal quotation marks and citation omitted). The "No Trespassing" policy continued throughout the mid-1990s and was gradually extended into other RRHA public housing developments, including Whitcomb Court.

The Need to Privatize Streets and Sidewalks

Although this policy yielded commendable results,[25] it had only limited success because the sidewalks and streets of RRHA housing projects remained public property. Thus, if police officers saw unauthorized persons trespassing upon RRHA-owned buildings and grounds, these intruders could avoid arrest and prosecution by simply stepping onto an adjacent public street or sidewalk. More was needed for RRHA to protect the health, safety, and welfare of tenants.

In a memorandum dated December 16, 1996, Gloria Rogers (Whitcomb Court housing manager) recommended a solution to her superiors – that the streets within that complex be privatized. Street privatization promised to achieve the following benefits: reduce the sale of drugs on streets and sidewalks; hold criminals accountable for unlawful acts; cut crime in public housing; and abolish open air drug markets.

Three days later, RRHA officials told City police and civic leaders at a public safety meeting that RRHA gradually wanted to "close all public right-of-ways to public use and travel within all of their public housing communities." A formal request followed in February 1997.

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[25] *See* Teresa Lemons, Public Housing Gentry's Calling Now, *Richmond News Leader*, Feb. 28, 1992, at 19 (discussing the Gilpin Court program and observing that "[p]reliminary police statistics show violent crimes in public housing decreased 5 percent from 1990 to 1991").

The Need to Reduce Illegal Activity in Whitcomb Court

The streets of Whitcomb Court, which is home to families living in 441 units, were among those selected first for privatization. This designation was not accidental. Long known as "one of the city's most violent and troubled housing projects,"[26] Whitcomb Court had been a popular venue for open air drug dealing.[27]

It was a place where a drug dealer choked to death trying to swallow packages of heroin,[28] an innocent 18-year-old woman was randomly killed when another teen fired a .45-caliber pistol into a passageway "[o]ut of frustration" because "a friend had been robbed of drugs,"[29] children could find guns while walking and bring them to an elementary school,[30] crack rocks were found under carpets lying on the street[31] or in a housing unit "in the refrigerator next to milk for a baby,"[32] assault rifles and other weapons stashed by drug dealers were found in trashcans,[33] and U.S. mail delivery was temporarily halted at a time when "many residents were expecting Social Security and other assistance

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[26] Mark Holmberg, Where the Past Blights the Present, *Richmond Times-Dispatch*, Aug. 30, 1998, at B1.

[27] Battino Batts Jr., Police Unit is Forcing the Issue: Strike Force Hits Drugs, Arms, *Richmond Times-Dispatch*, May 2, 1993, at B1.

[28] Area/State, Bag Got Stuck in Suspect's Throat, *Richmond Times-Dispatch*, Dec. 21, 1990, at B6.

[29] Alan Cooper, City Youth Gets 10-Year Term for 'Recklessness' in Girl's Death, *Richmond News Leader*, Nov. 7, 1990, at 24.

[30] Robin Farmer, Two Expelled Pupils Will Return to School, *Richmond Times-Dispatch*, Jan. 28, 1993, at B3.

[31] Sara Oppenheim, Patrol Officer Encounters Variety on Beat; Helping People is Policeman's Job Incentive, *Richmond Times-Dispatch*, Sept. 2, 1993, at B8.

[32] Area/State, Attempted Rape, Other Charges Dropped, *Richmond Times-Dispatch*, Sept. 7, 1990, at B5.

[33] Mark Holmberg, Raiding Trash Nets Contraband; Whitcomb Court Cleanup Turns Up Illegal Cache of Guns, Drugs, and Cash, *Richmond Times-Dispatch*, Aug. 3, 1994, at A1.

checks" because a postman was frightened after witnessing a murder.[34]

Within Whitcomb Court, the 2300 block of Bethel Street was especially violent – a block where a man was murdered while children played nearby,[35] major heroin and crack cocaine suppliers set up their shops[36] and dealt drugs within 1,000 feet of an elementary school,[37] a teenager was shot in the head while simply sitting in a car,[38] angry "words and a punch in the face" could lead to a deadly or paralyzing gunshot wound,[39] and police might find fifty people – several screaming – surrounding a fatality, but no witnesses.[40] The corner of Bethel and Deforrest Streets was "the city's most notorious drug corner."[41] Unsurprisingly, that corner and the 2300 block of Bethel Street were included in the streets and sidewalks of Whitcomb Court selected for privatization.

Officials from RRHA and the City further discussed privatization efforts in March 1997. At that time, the City police had "expressed support" for the proposed policy. It stated that "[t]he Police Department is expected to be the

[34] Gordon Hickey, Whitcomb Court Gets Mail Back but Postal Carriers Receive No Special Police Protection, *Richmond Times-Dispatch*, Oct. 5, 1994, at B1.
[35] Mark Holmberg, Crime Has Cut a Path Through Her Family: Grandmother Wonders Why It Went So Wrong, *Richmond Times-Dispatch*, Mar. 11, 1994, at A1.
[36] Alan Cooper, Murder, Drug Dealing Draw 2 Life Terms, *Richmond Times-Dispatch*, Apr. 25, 1996, at B3.
[37] Randolph Goode, Six Indicted in Whitcomb Court Case, *Richmond Times-Dispatch*, June 24, 1995, at B1.
[38] Area/State, Two Hurt in Separate Shootings, *Richmond Times-Dispatch*, Jan. 19, 1993, at B3.
[39] Frank Green, Encounter among Friends Was Deadly, *Richmond Times-Dispatch*, Sept. 13, 1991, at B11.
[40] Area/State, South Side Man Killed; Woman, 18, Shot in Head, *Richmond Times-Dispatch*, July 19, 1990, at B5.
[41] William Ruberry, Wrestling Richmond's Bad Guys, *Richmond Times-Dispatch*, May 2, 1994, at A1.

primary enforcement unit that will issue summons [sic] and arrest persons for violating trespassing rules and other infractions," and that

> [t]he primary focus in [law] enforcement will be to deter street level drug dealing, hanging out on street corners by non-residents and to discourage non-residents from entering public housing communities, except for legitimate social or business reasons.

In a letter dated April 11, 1997, RRHA's Director of Public Housing verified that if privatization were approved, "RRHA's only intent as owner of the streets, will be to help control . . . traffic that frequents our neighborhoods for illegal or other disruptive purposes." Although residents and school buses could "travel to and from Whitcomb Court as they do now," "the streets [and sidewalks] will clearly be marked as RRHA-owned private property."

The City Planning Commission unanimously voted to recommend approval of the closing of public rights-of-way in Whitcomb Court after a public hearing in May 1997.[42] On May 12, 1997, after a public hearing, City Council adopted Ordinance No. 97-143-124, which privatized the interior streets and sidewalks in Whitcomb Court, according to its powers under Va. Code Ann. § 15.2-2006, and §§ 2.03(a) and 2.04 of the City Charter. A newspaper editorial lauded the decision,[43] noting that it would make

> it easier to rid projects of criminals – often outsiders – preying on law-abiding residents

[42] Gordon Hickey, Roads Plan Aimed at Curbing Crime, *Richmond Times-Dispatch*, May 6, 1997, at B3.
[43] Editorial, The Streets, Richmond Times-Dispatch, May 17, 1997, at A6. *See generally* Editorial, In Good Hands, *Richmond Times-Dispatch*, Mar. 17, 1998, at A10.

> and transforming what should be peaceable habitations into combat zones.

This ordinance was amended on June 23, 1997 by Ordinance No. 97-181-197, so that City police could enforce traffic laws on the privatized streets. Similar ordinances privatizing streets in other RRHA-managed neighborhoods followed.

The City renounced its legal interest in the streets and sidewalks of Whitcomb Court by letter dated July 23, 1997. Two days later, the City deeded these thoroughfares over to RRHA, which subsequently authorized City police to enforce state criminal trespass laws on all of its properties.

RRHA erected "No Trespassing" signs on the streets and sidewalks of Whitcomb Court, so that people would know that Whitcomb Court was private property, and that their unauthorized presence would subject them to arrest.

The Success of the Trespass-Barment Policy

Statistical evidence compiled by the Crime Analysis Unit of the Richmond Police Department demonstrates that overall monthly crime rates declined in Whitcomb Court after the trespass-barment policy was implemented.[44]

01/01/96-07/31/97 (17 months before policy effected) [No. per month]	08/01/97-12/31/98 (19 months after policy effected) [No. per month]	01/01/99-06/05/02 (last 42 months policy in effect) [No. per month]
Violent: 2.4	2.1	1.9
Property: 5.6	4.1	4.2
Total: 8.0	6.2	6.1

[44] Due to a systems error, violent crimes and property offenses occurring on Deforrest Street during the period 01/01/00-06/05/02 are not included in the third column.

This notable reduction was a contributing cause to a general trend in Richmond, where the number of homicides (160 in 1994)[45] – dropped from 94 in 1998 to 69 in 2001 – the lowest total in the city since 1983.[46]

Hicks' Legal Challenge to the Trespass-Barment Policy

Under this policy, Kevin Lamont Hicks was arrested twice in 1998 for trespassing in Whitcomb Court, and a third time for damaging property in Whitcomb Court. Hicks was barred from Whitcomb Court (and all other RRHA property) on April 14, 1998. He signed the written barment notice that was served on him on that date. That notice plainly stated that he was not to trespass on RRHA property, and that if he did so in the future, he would be subject to arrest. The notice also recited the following excerpt from Virginia's criminal trespass statute, Va. Code Ann. § 18.2-119:

> 'If any person without authority of law goes upon or remains upon the lands, buildings, or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing by the owner, lessee, custodian, or other person lawfully in charge thereof, or after having forbidden to do so by a sign or signs posted . . . on such lands, buildings, premises or portion of area thereof at a place or places where it may be reasonably seen . . . he and/or she shall be guilty of a Class 1 Misdemeanor.'

[45] Evelyn V. McGill, Letter, Poor Lifestyle Choices Damage Innocents, *Richmond Times-Dispatch*, Sept. 20, 2001, at A20.
[46] Jim Mason, Homicide Rate Drops; Toll of 69 on 2001 Is Lowest Since 1983, *Richmond Times-Dispatch*, Jan. 2, 2002, at B1.

In January 1999, Hicks was arrested for trespassing on the sidewalk of the 2300 block of Bethel Street by a policeman who knew about Hicks' barment. Hicks was convicted in general district court. That conviction was later affirmed by the Circuit Court for the City of Richmond, and by a divided three-judge panel of the Court of Appeals of Virginia in a decision reported at 535 S.E.2d 678 (2000).

The Court of Appeals of Virginia, sitting *en banc*, reversed Hicks' conviction in a 6-5 decision reported at 548 S.E.2d 249 (2001), because the majority concluded that RRHA's trespass-barment policy was unconstitutional. In a 5-2 decision, the Supreme Court of Virginia affirmed that conclusion on the "narrow basis" that the trespass-barment policy was overbroad in violation of the First Amendment. Commonwealth v. Hicks, 563 S.E.2d 674 (2002). Two dissenting justices believed that the trespass-barment policy did not target First Amendment activity, that Hicks was not engaged in expressive conduct at the time of his arrest, and that the policy was valid because it sought "to create a safe, drug-free environment for the residents of Whitcomb Court." 563 S.E.2d at 685 (Kinser & Lemons, JJ., dissenting).

Ominous Evidence that Crime Is on the Rise

Despite the past success of law enforcement efforts, violent crime has increased in the months following the Supreme Court of Virginia's decision below. In 2002, the number of homicides in the City increased 20% from seventy to eighty-four. Twenty-nine (35%) of these murders occurred in November–December.[47]

[47] Mark Holmberg, Killings Rise in Richmond; Spike in Homicides Comes as Solved Cases Drop, *Richmond Times-Dispatch*, Jan. 3, 2003, at A1.

Unfortunately, Whitcomb Court is not immune from these trends. In September 2002, a man was found dead in a car parked on Whitcomb Street.[48] Later that month, a teen shot another teen in the back on Ambrose Street.[49] A woman who helped the victim lamented that "'we have to see young kids like him struggling for their lives because of dope.'"[50]

Open-air drug markets have returned to Whitcomb Court. Heroin is widely known to be available on Deforrest Street, crack cocaine on Ambrose Street, and marijuana on Bethel Street. When trespassers and other criminals see the police approach, they do, in fact, step onto the sidewalks and into the streets as they did before the trespass-barment policy was effected in 1997, thereby avoiding prosecution. They do not fear arrest or reprisal because of the decision below.

SUMMARY OF ARGUMENT

The overbreadth analysis conducted by a majority of the Supreme Court of Virginia conflicts with the well-settled jurisprudence of this Court in at least three principal areas.

First, this Court has held that an individual lacks standing to make an overbreadth challenge if his actions fall within the core of the conduct being regulated. Here, RRHA adopted a trespass-barment policy to reduce drug-related and other criminal activity in Richmond public housing, and to prevent outsiders from unlawfully trespassing on RRHA-owned private property after being forbidden to do so. Hicks was twice arrested for trespassing in Whitcomb Court, and a third time for causing property damage in Whitcomb Court.

[48] Area/State, Police Identify Shooting Victim, *Richmond Times-Dispatch*, Sept. 11, 2002, at B8.
[49] Area/State, Teen Charged with Shooting Another, *Richmond Times-Dispatch*, Sept. 18, 2002, at B4.
[50] Jim Mason, Teenager Is Shot, Critically Wounded, *Richmond Times-Dispatch*, Sept. 17, 2002, at B7 (citation omitted).

On each occasion, he was found guilty, but his sentence was suspended. Hicks was banned from RRHA properties in April 1998 for these and other offenses. Because Hicks' conduct falls squarely within the non-protected conduct proscribed by the trespass-barment policy, he lacked standing to raise an overbreadth argument.

Second, this Court has repeatedly held that whenever a policy restricts conduct, not speech, that policy may not be stricken as overbroad and violative of the First Amendment unless the overbreadth is both "real" and "substantial as well, judged in relation to the [policy's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The trespass-barment policy was adopted to meet tenant concerns about criminal acts committed by outsiders in public housing. It was not directed at limiting First Amendment activities, and there was no evidence that it has diminished or even chilled protected speech or conduct. When Hicks was arrested for trespassing in Whitcomb Court after RRHA had validly barred him from coming into that community, he stated that he was delivering diapers for one of his children. This conduct was not entitled to any First Amendment protection. Hicks, 563 S.E.2d at 683-85 (Kinser & Lemons, JJ., dissenting) (citing *inter alia* Broadrick, 413 U.S. at 615).

Finally, assuming *arguendo* that the trespass-barment policy encroached upon protected speech, this Court has held that the government can adopt content-neutral restrictions on speech in a non-public forum so long as those limitations are reasonable. Whitcomb Court was clearly a non-public forum when its streets and sidewalks were privatized, the "No Trespassing" signs were erected, and the trespass-barment policy went into effect – all of which occurred before Hicks' barment from that forum and arrest.

ARGUMENT

I. This Court should reverse the decision below and enter final judgment for the Commonwealth because public housing authorities have discretion to fight drug-related and other criminal activities in their neighborhoods and because Kevin Hicks, who was not engaged in expressive conduct at the time of his arrest, lacked standing to challenge the trespass-barment policy on overbreadth grounds.

At the federal level, as this Court has recognized, Congress has acknowledged that drug dealers are "increasingly imposing a reign of terror on public and other federally assisted low-income tenants," that "drugs lead[] to murders, muggings, and other forms of violence against tenants, and . . . deterioration of the physical environment" in which they live, and that persons have a right to live, and to raise their families, in "public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs." Rucker, 122 S. Ct. at 1232, 1235 (internal quotation marks and citations omitted).

These concerns motivated Chief Justice Rehnquist, writing without dissent for seven other justices and himself in Rucker, to conclude that the law affords public housing authorities "discretion to evict tenants for the drug-related activity of household members and guests" regardless of whether the tenant knew about or suspected criminal acts on the premises. 122 S. Ct. at 1233.

Unfortunately, the residents of Whitcomb Court and other public housing developments in Richmond have for years been exposed to the scourges of drugs that have negatively impacted the quality of life in their neighborhoods. Rucker, 122 S. Ct. at 1235. Indeed, more than a decade ago, when reviewing the reasonableness of

RRHA's "good faith" lease-based efforts at that time "to improve the safety and quality of life in public housing," and "stem the rising tide of crime and violence," one federal judge found that a "widespread presence of drugs and guns" has "created an atmosphere of fear and intimidation which now permeates" all "Richmond public housing." Richmond Tenants Org., Inc. v. Richmond Redevelopment and Housing Auth., 751 F. Supp. 1204, 1205 (E.D. Va. 1990), *aff'd*, 1991 WL 230214 (4th Cir. Nov. 8, 1991).

The concerns in Rucker and Richmond Tenants Org. mirror those that compelled RRHA, in coordination with the City, to seek to lower illegal drug and other criminal activity in Whitcomb Court through a trespass-barment policy that targeted the conduct, but not the speech, of non-residents.

Although the majority and dissent[51] understood the undeniable public safety rationale behind RRHA's policy, the majority wrongly concluded that Hicks could nevertheless "challenge the validity of his conviction on the basis that the Housing Authority's practices and procedures contravened his constitutional rights." Hicks, 563 S.E.2d at 677. Rather than analyze the nature or quality of his conduct at the time of his arrest, the majority merely observed that decisions from this Court and the Supreme Court of Virginia have "permitted criminal defendants to assert constitutional challenges to various ordinances in criminal prosecutions."

[51] *Compare* Hicks, 563 S.E.2d at 676 ("In an effort to eradicate illegal drug activity in Whitcomb Court, which was described as an 'open-air drug market,' [RRHA] sought to deny access to its property to persons who did not have legitimate reasons to visit the housing development. The majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not live there."), *with id.*, 563 S.E.2d at 685 (Kinser & Lemons, JJ., dissenting) ("The undisputed purpose of the [trespass-barment] policy is to create a safe, drug-free environment for the residents of Whitcomb Court. It cannot be questioned . . . that the prevention of crime in public housing is a legitimate governmental goal.") (citing Rucker, 122 S. Ct. at 1232).

Id. (citing *inter alia* Lovell v. City of Griffin, 303 U.S. 444 (1938)). This erroneous perception of standing conflicts with this Court's recognition that only those whose rights to speech have possibly been silenced or chilled have standing to claim overbreadth.

It is apparent that whenever a person's conduct "falls within the core of the regulation" at issue, he "lacks standing to contend that the regulation is vague and overbroad." Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (citing Parker v. Levy, 417 U.S. 733, 755-56 (1974)). *See also* Brecheisen v. Mondragon, 833 F.2d 238, 243 (10th Cir. 1987), *cert. denied*, 485 U.S. 1011 (1988) (holding that "'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'") (quoting Broadrick).

In Broadrick, three public servants challenged as both vague and overbroad the portion of a state act that prohibited governmental employees from, *inter alia*, soliciting political contributions, running for paid public office, and engaging in other partisan activity. 413 U.S. at 602-06. Both arguments failed. First, this Court deemed the vagueness claim "all but frivolous" because the state statute was written "'in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . . .'" *Id.* at 607-08 (citation omitted). Second, the act was not overbroad because it regulated "political activity in an even-handed and neutral manner." *Id.* at 616. This Court stated that judicial concern over an allegedly overbroad standard "attenuates as the . . . behavior . . . moves from 'pure speech' toward conduct . . . that . . . – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over

harmful, constitutionally unprotected conduct."[52] *Id.* at 615. Notably, this Court further explained that although laws,

> if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id. (citation omitted). *See also* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (citing favorably this principle); Ferber, 458 U.S. at 770 (same).

Here, that "point" was reached and clearly exceeded. As noted *supra*, Hicks had been convicted on multiple prior occasions for trespassing in Whitcomb Court. He was ultimately barred from that community, and all other RRHA neighborhoods, on that basis. Moreover, the state trial court judge who first tried Hicks had ordered him in open court not to return onto RRHA property. Rather than heed these legal directives, Hicks proceeded to trespass again in Whitcomb Court. When he was stopped and questioned by a policeman who knew about Hicks' barment, he indicated that he was delivering diapers, not engaging in protected speech. Hicks, 563 S.E.2d at 684 (Kinser & Lemons, JJ., dissenting).

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[52] *See also* New York v. Ferber, 458 U.S. 747, 770 (1982); Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs, 32 F.3d 1436, 1442-43 (10th Cir. 1994) (expressive conduct was too attenuated for First Amendment protection); United States v. Gilbert, 813 F.2d 1523, 1530-31 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (no overbreadth where "possibility of the statute's reach into substantial, impermissive, protected activity appears remote") (quotation at 1531), *overruled in part on other grounds*, United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002); Aiello v. City of Wilmington, 623 F.2d 845, 852-56 (3d Cir. 1980).

Hick's conduct at the time of his arrest was clearly not subject to any First Amendment protections, and did not afford him any basis to raise a facial overbreadth challenge below. Broadrick, 413 U.S. at 612 ("[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."). RRHA's trespass-barment policy was clearly designed to help eliminate crime and reduce drug-related activity in public housing, not to chill any forms of protected speech. It is equally clear that Hicks' "undisputed conduct . . . fell clearly within the challenged" RRHA policy. *Cf.* Fisher v. Coleman, 639 F.2d 191, 192 (4th Cir. 1981) (*per curiam*) (affirming that defendant's fifty-nine convictions in roughly two years for public drunkenness did not confer standing to challenge alleged overbreadth of statute prohibiting sale of alcohol to a "habitual drunkard").

The majority's citation below to Lovell in conferring standing on Hicks was misplaced. In Lovell, this Court invalidated an ordinance that sought to bar the distribution of "'circulars, handbooks, advertising, or literature of any kind'" without a permit. 303 U.S. at 447, 450-52 (quotation at 450). That ruling has no bearing when, as here, the conduct being proscribed (trespassing and criminal activity, including drug-related activity) does not chill speech.

Because Hicks knew that he had been banned from RRHA properties, never appealed or challenged his barment, and then proceeded to trespass in Whitcomb Court on private property after he had been warned not to do so, his conduct unequivocally fell within the scope of the trespass-barment policy, and the Supreme Court of Virginia erred by not denying his overbreadth challenge *ab initio* for lack of standing.

II. This Court should also reverse the decision below and enter final judgment for the Commonwealth because any alleged overbreadth in the trespass-barment policy was neither real nor substantial in light of the policy's legitimate sweep.

Assuming *arguendo* that Hicks had standing to raise an overbreadth challenge, the majority below erred through its refusal to recognize that RRHA's trespass-barment policy bars conduct, not speech. Thus, the trespass-barment policy could only be stricken as overbroad if the overbreadth was both real and substantial. Broadrick, 413 U.S. at 615 (noting that "where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). Because Hicks offered no evidence of real or substantial overbreadth, the decision below should not stand.

It is readily apparent that a policy designed to reduce trespassing, and drug-related and other criminal activities, is one that reaches conduct, not speech. *See, e.g.*, United States v. Bader, 698 F.2d 553, 556 (1st Cir. 1983) (regulation of disorderly conduct did not target speech); Champagne v. Gintick, 871 F. Supp. 1527, 1533 (D. Conn. 1994) (anti-stalking law only prohibited conduct); People in Interest of J.M., 768 P.2d 219, 224 (Colo. 1989) (juvenile curfew law regulated conduct); Commonwealth v. Moyer, 35 Pa. D. & C.3d 475, 488 (Pa. Ct. Common Pleas 1984) (noise law directed towards conduct, not communication). Thus, when conduct is primarily involved, a policy is not made overbroad because it can theoretically be extended to include speech. Taxpayers for Vincent, 466 U.S. at 800 ("It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.") (internal footnote omitted).

Moreover, this Court confirmed in Ferber that it has

> 'repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied' . . . . '[T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable.' Moreover, '[without] a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.'

458 U.S. at 770 n.25 & 772 n.27 (citations omitted). It also verified that "substantial overbreadth" can only arise if a law or policy reaches "'a substantial number of impermissible applications . . . .'" *Id.* at 771.

Here, Hicks had the burden to show that the trespass-barment policy was "substantially overbroad" – *i.e.*, Hicks had to demonstrate that there is "a realistic danger that the [trespass-barment policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Taxpayers for Vincent, 466 U.S. at 801. *See also* Thorburn v. Austin, 231 F.3d 1114, 1121-22 (8th Cir. 2000) (no such danger in law prohibiting targeted picketing against specific person); State v. Bouye, 484 S.E.2d 461, 465 (S.C.), *cert. denied*, 522 U.S. 822 (1997).

But the realistic danger here arises not from the trespass-barment policy itself, but by its absence. For years, tenants in Whitcomb Court and other neighborhoods were

"victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic." Richmond Tenants Org., 751 F. Supp. at 1207. As noted *supra*, RRHA devised and executed the trespass-barment policy to increase public safety, and lower criminal activity by unwelcome outsiders and trespassers, in its communities. The clear and present danger created by violent conditions in Whitcomb Court and other RRHA neighborhoods justified implementation of the policy. *See supra* text accompanying n.51. *See also* Khademi v. South Orange County Community College Dist., 194 F. Supp. 2d 1011, 1026 (C.D. Cal. 2002) ("The state has a compelling interest in the enforcement of its criminal laws.") (citing Branzburg v. Hayes, 408 U.S. 665, 700-01 (1972)).

In contrast to the policy's "plainly legitimate sweep," Broadrick, 413 U.S. at 615, the record displays no "real" or "substantial" concern that speech is being silenced.[53] Gloria Rogers testified that she had never denied permission to anyone wishing to distribute flyers in RRHA developments. During his criminal proceedings, Hicks offered no witnesses to establish that anyone had refused to come into Whitcomb Court for fear of arrest or prosecution[54] under the policy.

Simply stated, Hicks utterly failed his burden to show that the trespass-barment policy was chilling or prohibiting any protected, or arguably protected, speech. This is fatal to his overbreadth claim. Taxpayers for Vincent, 466 U.S. at 801 (no overbreadth in part due to lack of evidence of impact on third parties).

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[53] *See generally* Gormley v. Director, 632 F.2d 938, 942 (2d Cir.), *cert. denied*, 449 U.S. 1023 (1980) ("The risk that the statute will chill people from . . . the exercise of free speech is remote. The evil against which the statute is directed is both real and ugly.").

[54] Gloria Rogers testified that nobody is arrested until after being warned not to trespass on RRHA property. Her testimony was uncontested, and Hicks was admittedly arrested after being both warned and barred.

Because criminal conduct is not entitled to any First Amendment protections,[55] and because this appeal presents a "paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications," this Court should reverse the error below and enter final judgment for the Commonwealth. Ferber, 458 U.S. at 773.

III. This Court should also reverse the decision below and enter final judgment for the Commonwealth because privatized sidewalks and streets owned by a local housing authority constitute a non-public forum.

Although the Supreme Court of Virginia held that the trespass-barment policy was overbroad in violation of the First Amendment, the majority did not consider whether the privatized streets and sidewalks of Whitcomb Court are public or non-public fora.[56] Instead, it vacated that portion of the Court of Appeals' decision below without addressing that issue. Hicks, 563 S.E.2d at 681.

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[55] *See, e.g.*, Trushin v. State, 384 So. 2d 668, 674 (Fla. Dist. Ct. App. 1980), *approved*, 425 So. 2d 1126 (Fla. 1982) (no substantial overbreadth where law "confined to non-protected, clearly criminal conduct"); People v. Jamesson, 768 N.E.2d 817, 824 (Ill. App. Ct.), *appeal denied*, 2002 Ill. LEXIS 1208 (Ill. Oct. 2, 2002) (unlawful contact with street gang members not protected by First Amendment); State v. Woodworth, 234 N.W.2d 243, 250 (N.D. 1975) (no substantial overbreadth where law "intended to regulate conduct which threatens the public peace").

[56] The mere fact that Hicks was arrested on a sidewalk is not dispositive of this issue. United States v. Kokinda, 497 U.S. 720, 727-29 (1990) (sidewalk from a parking lot to a post office was a non-public forum); Hawkins v. City and County of Denver, 170 F.3d 1281, 1287 (10th Cir.), *cert. denied*, 528 U.S. 871 (1999) (pedestrian walkway not generally utilized "as a throughway to another destination" was non-public forum); American Civil Liberties Union v. City of Las Vegas, 13 F. Supp. 2d 1064, 1074 n.2 (D. Nev. 1998), *appeal dismissed*, 1999 U.S. App. LEXIS 6700 (9th Cir. Feb. 4, 1999) ("[N]ot all public sidewalks are traditional public fora.") (citing *inter alia* Kokinda).

Assuming *arguendo* that the trespass-barment policy can be properly subjected to a First Amendment overbreadth challenge,[57] the majority below erred in subjecting the policy to a strict scrutiny analysis because Hicks was in a non-public forum at the time he was arrested under a policy that was both reasonably related to the purpose of that forum and viewpoint-neutral. This conclusion is compelled by principles that are firmly rooted in decisions of this Court.

First, "'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.'" Taxpayers for Vincent, 466 U.S. at 814 (citation omitted). *See also* Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 966 (9th Cir. 2002) ("'[N]ot all publicly owned property becomes a public forum simply because the public is permitted to come and go at the site'") (citation omitted); Hawkins, 170 F.3d at 1287.

Second, "'[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

Third, the government can put persons on notice of a non-public forum by erecting some sort of "indication . . .

[57] The dissenting justices on the Supreme Court of Virginia analyzed the trespass-barment policy under the Fourteenth Amendment, not the First Amendment, because the policy "does not directly regulate activity protected by the First Amendment" and because Hicks "was not engaged in speech or expressive" conduct when arrested. Hicks, 563 S.E.2d at 682, 684 (Kinser & Lemons, JJ., dissenting). *See also* Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) ("Because the no-trespass policy does not implicate any fundamental right, we review it under the rational basis standard.").

that they have entered some special type of enclave."[58] Grace, 461 U.S. at 180.

Here, by prominently erecting "No Trespassing" signs "every 100 feet" along these very streets and sidewalks, RRHA put all on notice that Whitcomb Court and its streets and sidewalks were now "private property . . . owned by RRHA" and that "[u]nauthorized persons will be subject to arrest and prosecution." Hicks, 563 S.E.2d at 676. Those signs gave prominent notice that Whitcomb Court was a non-public forum, and were clearly visible to Hicks when he was arrested.

Arguably, RRHA did not have to privatize the streets and sidewalks in order to effect its trespass-barment policy. In Daniel v. City of Tampa, 843 F. Supp. 1445 (M.D. Fla. 1993), *aff'd*, 38 F.3d 546 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995), a case squarely on point with Hicks, the United States Court of Appeals for the Eleventh Circuit upheld the Tampa Housing Authority's trespass-barment policy against someone clearly engaging in expressive conduct (unlike Hicks) without any finding that the streets or sidewalks in Tampa public housing had been privatized (unlike Hicks).

Like RRHA, the Tampa Housing Authority had used a trespass-barment policy "to deter drug transactions" in areas known to "have a history of drug problems." 843 F. Supp. at 1446. Plaintiff had been arrested three times in two years for trespassing in public housing properties to distribute leaflets and post signs. *Id.* at 1447. He ultimately challenged the trespass-barment policy on various

[58] *See also* Brister v. Faulkner, 214 F.3d 675, 682 (5th Cir.), *cert. denied*, 531 U.S. 985 (2000) (public forum where no indicia present); Hawkins, 170 F.3d at 1287; United States v. Gilbert, 130 F.3d 1458, 1460-61 (11th Cir. 1997), *cert. denied*, 523 U.S. 1088 (1998) (non-public forum set off by a row of planters across plaza).

constitutional grounds, including that it was overbroad and violative of the First Amendment. *Id.* at 1446-47. The district court rejected his arguments and entered judgment as a matter of law for the housing authority in part because these properties were non-public fora. *Id.* at 1447. The fact that the housing authority "never allowed non-residents to solicit, canvass, or distribute literature on its properties, and the lack of a formal policy forbidding this activity [did] not amount to the designation of the property as a public forum." *Id.* Thus, strict scrutiny did not apply, and the policy easily met the reasonableness standard because it was tied to "the public's compelling interest in keeping out dangerous drug dealers," and was not content-based in nature. *Id.* at 1447-48 (quotation at 1448).

The Eleventh Circuit affirmed, noting that the

> official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum.

38 F.3d at 550 (citing *inter alia* Kokinda, 497 U.S. at 727).

Here, it is equally beyond dispute that the privatized streets and sidewalks of Whitcomb Court are non-public fora. Whitcomb Court does not have to be transformed into a gated

community[59] or a "'mental concentration camp[]'"[60] in order for this non-public status to attach. This is especially true in light of its unique geography – it is bounded by an interstate highway, and its interior streets and sidewalks cannot be used as shortcuts to destinations beyond that neighborhood.

Because Hicks was not engaged in protected speech at the time of his arrest pursuant to a trespass-barment policy that did not chill the exercise of First Amendment rights, the analysis in Daniel and Thompson[61] should control. Likewise, this Court should reverse the erroneous ruling below, uphold the constitutionality of RRHA's trespass-barment policy, and enter final judgment for the Commonwealth.

CONCLUSION

In March 2000, a city resident rhetorically asked: "Does a child in Whitcomb Court have the same likelihood of happiness and success as a child born anyplace else in the U.S.? If the answer is no, we have [] work to do."[62]

At that time, a child being raised in Whitcomb Court was protected in no small part by a trespass-barment policy designed to reduce crime and to provide him or her with a much safer environment in which to grow. This frontline policy failed not because it chilled speech, but because the Supreme Court of Virginia wrongly likened Hicks, who was

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[59] Gordon Hickey, Richmond to Get $2 Million for Police from Crime Bill; 18 New Officers Financed for Three Years, *Richmond Times-Dispatch*, Oct. 11, 1994, at B3 (observing that this concept was once considered).

[60] Lea Setegn, Where Will They Go? Planned Public Housing Losses Worry Residents, *Richmond Times-Dispatch*, May 13, 2002, at A1 (citation omitted).

[61] *See supra* text accompanying n.57.

[62] Robin Farmer, Candidates Have a Parental View, *Richmond Times-Dispatch*, Mar. 22, 2000, at B6.

delivering diapers, to someone who was engaged in "door-to-door canvassing and pamphleteering." Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 122 S. Ct. 2080, 2086 (2002). This was error.

In Rucker, this Court held without dissent that "local housing authorities . . . are in the best position to take account of . . . the degree to which the housing project suffers from 'rampant drug-related or violent crime," and to implement "'reasonable steps to prevent or mitigate the offending action.'" 122 S. Ct. at 1235 (citations omitted). If the analysis below is allowed to stand, RRHA, and other public housing authorities across the United States, will lose that discretion, and the ability to help protect tenants from deadly external forces. This should not be allowed to occur.

For the reasons discussed above, and for the reasons explained by the Commonwealth and other supporting *amici* in their briefs, this Court should reverse the decision below by the Supreme Court of Virginia, and enter final judgment for the Commonwealth.

Respectfully submitted:

John A. Rupp (V.S.B. No. 15475)
City Attorney
Norman B. Sales (V.S.B. No. 23408)
Senior Assistant City Attorney
City Hall, Room 300
900 East Broad Street
Richmond, VA 23219
(804) 646-7940

Counsel for *Amicus Curiae* City of Richmond, Virginia

William G. Broaddus (V.S.B. No. 05284)
*(Counsel of Record)
Jonathan T. Blank (V.S.B. No. 38487)
William H. Baxter II (V.S.B. No. 42587)
Godfrey T. Pinn, Jr. (V.S.B. No. 43106)
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

Counsel for *Amicus Curiae* Richmond Redevelopment and Housing Authority